IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GREGGORY JOHNSON, Respondent, v. KAREN ANN KNOUD, Appellant.	No. 36891-9-II UNPUBLISHED OPINION

Armstrong, J. — Karen Knoud appeals the trial court's denial of her motion to vacate a judgment quieting title to real property in Greggory Johnson. We affirm.

FACTS

In November 2002, Knoud signed an agreement to sell a rental home to Johnson that she had received in a dissolution proceeding. By statutory warranty deed dated January 16, 2003, Johnson purchased the home for $170,000. At closing, Johnson paid Knoud $40,743.36 and executed a promissory note for $25,500 and a second deed of trust to Knoud to pay the balance of her equity in the home. Johnson also paid off Knoud's outstanding underlying loan of more than $90,000.

When this transaction occurred, Knoud and Johnson were living together in Johnson's home. They separated in June 2004. Between September 2003 and July 2004, Johnson made payments of more than $27,000 in checks directly to Knoud or on her behalf to assist in her purchase of a day spa. In June 2005, Johnson decided to sell the house he had purchased from Knoud, but the title report disclosed the outstanding deed of trust she held against the property. When Knoud refused Johnson's request to reconvey the promissory note and deed of trust back

to him, Johnson sued to quiet title. Knoud's attorney filed an answer alleging only that she had the defenses of "[f]ailure to state a claim upon which relief can be granted," "[l]atches," and "[f]raud." Clerk's Papers at 28. On April 7, 2006, the attorney filed a notice of intent to withdraw on April 20, noting that trial was set for July 20.

When the matter came to trial, Knoud did not appear because she was in jail on charges of harassment, second degree assault, and violating a no-contact order. Her attorney in the criminal case had notified the court on July 19 that Knoud would not be able to attend the July 20 trial because she was in jail on a no-bail hold awaiting a competency evaluation by Western State Hospital. In a letter to the court dated July 10, Knoud had explained her situation and added that she could not sign the property over to Johnson because he had not paid her the money he owed. She also asked the court for a continuance so that she could retain an attorney.

Knoud's sister and attorney-in-fact, Rita Thompson, appeared in court on July 20, stating that her sister had asked her to request a continuance. Thompson admitted that she was not an attorney. The court permitted the trial to proceed, and Johnson's attorney explained that when his client purchased the house from Knoud, she lent him $25,500 and took a second note in deed of trust against the property. Johnson testified that soon after this transaction, Knoud purchased a day spa. With money borrowed from his father, Johnson paid all the monies owed by paying Knoud's obligations for the purchase of the spa. To support that testimony, he offered copies of the checks he wrote. Johnson added that Knoud had refused his requests to reconvey the note and second deed of trust. The trial court granted the relief requested, whereupon Thompson asked whether the matter could be continued so Knoud could tell her side of the story. When the

court noted that there was no attorney representing Knoud, Thompson said she did not know Knoud needed one and explained that Knoud had wanted her to seek a continuance so Knoud could hire an attorney. The court replied that Knoud had had 90 days to find an attorney and that Johnson's request for relief would be granted. On July 31, 2006, the court entered a judgment quieting title to the property in Johnson, appointing an agent to execute the necessary documents, and granting Johnson attorney fees and costs. Johnson subsequently sold the property.

On July 31, 2007, Knoud filed a motion to vacate the judgment. In her supporting memorandum, she explained that she was in jail at the time of trial, based on criminal complaints filed by Johnson and his employee. She argued that the quiet title judgment should be vacated because the November 2002 sales agreement was invalid, citing CR 60(b)(2), (4), and (11). Knoud alleged that Johnson had forged the signature of her attorney-in-fact on the sales agreement and that she was mentally incapacitated when she signed the agreement. Johnson responded that there was no proof that Knoud was of unsound mind when he purchased the home and that she never raised the issue of incapacity in her answer to his quiet title complaint. He also clarified that Knoud did not live in the home he had purchased.

During the show cause hearing on the motion to vacate, Knoud's attorney argued that his client lacked the mental capacity to execute the sales agreement because of a head injury and that she had presented a prima facie case of mental incapacity and fraud. Johnson replied that the only issue below was whether he had paid the promissory note and that the court could not retry the case based on new allegations. Johnson contended that there was no evidence that Knoud was incapacitated at the time of the sales agreement and that if the court agreed to vacate the

judgment, the only issue would be whether he had satisfied his $25,000 debt to her. Johnson pointed out that at the time Knoud was allegedly incompetent, she had purchased a day spa and had subsequently filed suit against the seller to rescind that sale without mention of mental incapacity. The court declined to vacate its judgment, stating that Knoud was represented when the pleadings put the matter at issue and that there had been no mention of incapacity at that time. Knoud appeals the denial of her motion to vacate the July 31, 2006 judgment.

ANALYSIS

I. Standard of Review

We will not reverse a trial court's denial of a motion to vacate under CR 60(b) absent a showing that the trial court manifestly abused its discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994).

Our review of a trial court's denial of a CR 60(b) motion is limited to the propriety of the denial rather than the impropriety of the underlying judgment. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Accordingly, an unappealed final judgment cannot be restored to an appellate track by moving to vacate and appealing the denial of that motion. *Gaut*, 111 Wn. App. at 881.

CR 60(b) provides several bases for vacating a final judgment. In her original motion, Knoud cited CR 60(b)(2), (4), and (11). On appeal, she relies on (2) and (4), briefly cites other subsections, and does not refer to (11). Because we do not consider issues abandoned on appeal

or raised for the first time on appeal, we address only CR 60(b)(2) and (4). *See Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978); *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn. App. 280, 284, 673 P.2d 634 (1983).

II. CR 60(b)(2)

Under CR 60(b)(2), the court may relieve a party from a final judgment "[f]or erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings[.]" CR 60 adds that a motion based on CR 60(b)(2) must be made not more than one year after the judgment was entered, and that if the party entitled to relief is of unsound mind, the motion shall be made within one year after the disability ceases. Knoud filed her motion to vacate one year after the 2006 judgment was entered. She did not assert in her motion that she was of unsound mind in 2006, but she did maintain that she was of unsound mind at the time of the 2002 sales agreement. She also filed a declaration stating that her incapacity had ceased by 2005; therefore, the timeliness of her request for relief under CR 60(b)(2) is questionable. Furthermore, as Johnson points out, although no judgment was entered against Knoud based on the 2002 purchase and sales agreement that could be vacated under CR 60(b), her CR 60(b) motion is aimed at invalidating that agreement. In spite of these procedural flaws, we briefly address whether Knoud was entitled to relief under CR 60(b)(2) for her alleged incapacity in 2002.

A motion to vacate must meet evidentiary as well as timeliness requirements. CR 60 requires a party to show the facts or errors upon which the motion to vacate is based, and if she is the defendant, "the facts constituting a defense to the action[.]" CR 60(e)(1). After a party obtains a judgment, it is assumed that he has substantial evidence to support his claim, and if a CR 60 moving party cannot produce substantial evidence to oppose the claim, there is no point in setting aside the judgment and conducting further proceedings. *Pfaff v. State Farm Mut. Auto.*

Ins. Co., 103 Wn. App. 829, 834, 14 P.3d 837 (2000). A trial court must take the evidence and reasonable inferences in the light most favorable to the moving party when deciding whether she has presented substantial evidence of her defense under CR 60. *Pfaff*, 103 Wn. App. at 834.

In her motion to vacate, Knoud supported her claim that she was of unsound mind when she entered into the 2002 sales agreement with her declaration and a 1999 guardian ad litem report. Her declaration explained that a 1999 suicide attempt had left her temporarily brain damaged but that she had made a full recovery by 2005. She stated that she began dating Johnson in 2002 and that he knew of her disability. She added that Johnson talked her into selling her home to him and that he forged the signature of Thompson, her attorney-in-fact, on the sales agreement.[1] The guardian ad litem reported that although Knoud was incapacitated when the guardian wrote its report in 1999, she was making a good recovery, and the guardian ad litem recommended against establishing a guardianship.

Johnson countered that Knoud had purchased a tanning salon in the spring of 2002, before the parties entered into the sales agreement, and that she operated the salon until December 2003. Knoud purchased the day spa in September 2003. According to Johnson, Thompson did not sign any documents relating to these purchases.[2] Furthermore, Knoud sued the seller of the day spa in 2005, but she did not allege that the purchase was void because of incapacity.

Even if Knoud's alleged incapacity at the time of the 2002 sales agreement is relevant to the propriety of the quiet title judgment Knoud sought to vacate, it does not appear that Knoud

[1] Thompson filed a declaration stating that she did not sign the agreement. Johnson does not admit forging it but asserts that her signature was not necessary to validate the sale.

[2] Thompson's signature is not on the 2003 spa purchase agreement. The tanning salon agreement is not in the record.

presented substantial evidence of the 2002 incapacity. *See State v. Wyse*, 71 Wn.2d 434, 436, 429 P.2d 121 (1967) (persons of unsound mind include only those who are commonly called insane and those without comprehension at all, not those whose comprehension is merely limited). Everyone is presumed sane, and this presumption is overcome only by clear, cogent, and convincing evidence. *Page v. Prudential Life Ins. Co.,* 12 Wn.2d 101, 109, 120 P.2d 527 (1942). A person has sufficient mental capacity to enter into a contract when she "possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which [she] is engaged." *Page*, 12 Wn.2d at 108 (citation omitted). A person's capacity is a factual issue. *Page*, 12 Wn.2d at 109.

When viewed in the light most favorable to Knoud, her declaration and the 1999 guardian ad litem report do not constitute clear, cogent, and convincing evidence that she was of unsound mind when she entered into the 2002 sales agreement. And because Knoud did not raise her alleged incapacity at the time of trial in 2006 in her motion to vacate, we do not address it. Thus, Knoud did not establish a prima facie case warranting the granting of her motion to vacate under CR 60(b)(2).

III. CR 60(b)(4)

CR 60(b)(4) authorizes a trial court to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. The rule does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). The fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented

from fully and fairly presenting its case or defense. *Lindgren*, 58 Wn. App. at 596.

The party attacking a judgment under CR 60(b)(4) must establish the elements of fraud by clear and convincing evidence. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828, 959 P.2d 651 (1998). Knoud must show that Johnson made a knowing and false representation of material fact; that she was ignorant of that falsity; that she reasonably relied on that representation; and that she suffered damage. *See N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482 (1981).

In her original motion to vacate, Knoud charged that Johnson's alleged forgery of Thompson's signature on the 2002 sales agreement, combined with her own incapacity at the time, constituted the fraud that invalidated the 2006 judgment. On appeal, Knoud alleges for the first time that the absence of evidence showing that Johnson served Thompson with any of the pleadings in the quiet title action shows that the judgment was procured by fraud. She also asserts on appeal that the quiet title judgment left her homeless.

Assuming, without deciding, that the allegedly fraudulent 2002 conduct contributed to the 2006 quiet title judgment, Knoud does not establish the elements of fraud. As stated above, she did not produce clear and convincing evidence of her own incapacity to enter into the sales agreement in 2002. Even if Johnson did forge Thompson's signature on that agreement, Knoud does not establish that she relied on that signature and Thompson's purported approval in agreeing to sell Johnson the property. Knoud signed the agreement on November 26, 2002, and Thompson's signature is dated December 9, 2002. Furthermore, there is no dispute that Knoud received the majority of the proceeds from the sales agreement; the only question is whether she

received the $25,500 owing on the promissory note. Johnson produced substantial evidence of that receipt during the 2006 trial. Accordingly, Knoud does not show that the sales transaction damaged her in any way. Contrary to her unsupported assertions on appeal that the quiet title action left her homeless, the second deed of trust listed her Puyallup address as different from that of the Graham property at issue. When Knoud's attorney withdrew in April 2006, Knoud still had that Puyallup address.

Although Knoud could not appear at the 2006 trial, she did not argue in her motion to vacate that fraud contributed to her inability to appear. Nor did she raise any issue concerning service of the pleadings, which we decline to consider for the first time here. She was informed of the trial date when her attorney withdrew in April, leaving her more than three months to retain an attorney to represent her in the July 20 trial. Hence, Knoud does not establish that fraudulent conduct caused the court to enter the quiet title judgment against her.

We conclude that the trial court did not abuse its discretion in denying Knoud's motion to vacate the quiet title judgment under CR 60(b)(2) and (4).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.